No. 05-____

IN THE
Supreme Court Of The United States

CARLTON B. JONES
Petitioner

v.

MABEL S. JONES
Respondent

On Petition for A Writ of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by failing to consider if the facts, taken in the light most favorable to the non-moving party, supported Officer Jones' defense of qualified immunity as a matter of law as presented in his motion for summary judgment.

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PETITION FOR A WRIT OF CERTIORARI

Carlton Jones petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION OF OPINIONS BELOW

Neither the judgment of the Fourth Circuit (App., infra, 1a) nor the opinion of the District Court (App., infra, 3a) is reported.

JURISDICTION

The order of the Fourth Circuit dismissing the appeal was entered on September 2, 2005. The denial of Petitioners' motion for rehearing en banc was entered on September 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Dr. Mabel Jones, brought this action based on the death of her son, Prince Jones, Jr. and initially filed suit in the United States District Court for the District of Columbia naming as defendants two Prince George's County police officers, Cpl. Carlton Jones and Sgt. Alexandre Bailey, Prince George's County (hereinafter "the County") and John Farrell, the former Chief of Police. Dr. Jones contends that the death of her son was a violation of his civil rights and other torts asserting these claims through a survival action and also a right of recovery pursuant to the wrongful death act of the Commonwealth of Virginia.

A motion to dismiss on the basis of improper venue was denied because the allegation that a conspiracy to violate the decedent's rights occurred, in part, in the District of Columbia. At the conclusion of discovery, a motion for summary judgment on behalf of all defendants as to all claims was filed. The trial court granted summary judgment on the conspiracy claim and transferred the case to the United States District Court for the District of Maryland. It deferred to that court a ruling on the remaining issues raised by the motion for summary judgment.

The United States District Court for the District of Maryland considered the remaining claims and granted judgment to Sgt. Bailey, Chief Farrell and the County. It denied motion as to Cpl. Jones concluding that because the officer couldn't recall the moments immediately surrounding the shooting summary judgment was inappropriate. The officer appealed this ruling as the motion was based, in part, on the assertion of qualified immunity.

Dr. Jones moved to dismiss the appeal on the basis that a genuine issue of material fact existed making an interlocutory review of a denial of summary judgment on the grounds of

qualified immunity was inappropriate. The Fourth Circuit granted this motion and dismissed the appeal without further comment.

The United States District Court for the District of Maryland had jurisdiction over this action pursuant to 28 U.S.C. §1331 as the Complaint alleged a violation of 42 U.S.C. §1983. The United States Court of Appeals for the Fourth Circuit has jurisdiction over this appeal based upon 28 U.S.C. §1291. Officer Jones filed a motion for summary judgment based, in part, on qualified immunity that was denied on April 28, 2005. The appeal from that order was filed on May 16, 2005. Although not all issues were resolved in the trial court, an interlocutory appeal is permitted on the issue of the denial of qualified immunity under the authority of *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct 2806, 2818 (1985).

Statement Of The Facts

This case results from a police-involved shooting on September 1, 2000, in Fairfax County, Virginia. Dr. Jones has brought this lawsuit as the personal representative of her deceased son. JA 10.[1] At the time of this incident, Cpl. Carlton Jones and Sgt. Alexandre Bailey were employed by the Prince George's County Police Department. JA 10-11. John Farrell was the Chief of Police. JA 11. Cpl. Jones and Sgt. Bailey were assigned to a team that handled narcotic investigations as well as assisting other investigative sections of the district. JA 26, 167-68.

On or about June 16, 2000, a Prince George's County police officer's gun was stolen and information was developed that a Darryl Gilchrist currently possessed it. JA 174-75, 177. It was also known that this individual assaulted officers with vehicles on two separate occasions during narcotics-related investigations. JA 56-57, 175-76, 197-99. Mr. Gilchrist was know to drive a black Jeep Cherokee and to have associated with a Chenier Hartwell. JA 53, 56-57, 65, 171-73. Mr. Hartwell was alleged to have participated with Mr. Gilchrist in narcotics transactions, an armed robbery and been a passenger in the vehicle on one occasion when

[1] "JA" refers to the joint appendix that was filed by the parties in the Fourth Circuit prior to the dismissal of the appeal.

Mr. Gilchrist attempted to run over an officer. JA 53-57, 171-72, 190-91, 197.

A determination was made to locate Mr. Gilchrist's residence and execute a search warrant in an attempt to recover the weapon. JA 47-48, 63-64. Cpl. Jones and Sgt. Bailey had been advised that Mr. Gilchrist frequents an area near Kennedy Street in the District of Columbia and that Mr. Hartwell was living at 5708 16th Avenue, Hyattsville (Cypress Creek Apartments). JA 39-41, 70-71, 200. On September 1, 2000, Cpl. Jones was conducting surveillance in an attempt to locate Mr. Gilchrist on Kennedy Street. JA 36, 47-48, 67, 192-93.

While in the District, Cpl. Jones saw a black Jeep Cherokee, similar to Mr. Gilchrist's, with Pennsylvania tags and writes down the tag number. JA 67-69. After losing sight of the vehicle, the officer goes to Mr. Hartwell's suspected address in Cypress Creek Apartments and sees the same vehicle with Pennsylvania tags. JA 67, 70-71, 76-78.

These officers follow the vehicle through the District and into Virginia where Sgt. Bailey missed an exit and is separated from Cpl. Jones and the Jeep. JA 93-95, 97-98, 186-87. The Jeep makes a U-turn and uses a service road to enter a neighborhood and Cpl. Jones followed. JA 100. The officer arrives at an intersection and sees the silhouette of a Jeep backed into a driveway off to the left. JA 101. He turns left into the street and, after passing the driveway where the Jeep is located, its lights come on and the Jeep drives past Cpl. Jones. *Id.* The officer begins to make a three-point turn but the Jeep backs up to his door and the driver[2] exits his vehicle and runs toward Cpl. Jones. JA 101-02, 112-13. Cpl. Jones pulls his service weapon and says, "Police. Get back in the car." and Prince Jones returns to the vehicle and begins to drive away. *Id.*

The officer begins to secure his weapon, hears tires spinning and sees the Jeep coming towards him. JA 102-03, 129-30. The Jeep strikes Cpl. Jones' vehicle at the driver's door then pulls forward. *Id.*; JA 222. The vehicle's engine revs and smoke

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[2] The driver was actually Prince Jones although Cpl. Jones did not learn his identity until after the shooting. *See* JA 116-18, 232.

comes from the tires as Mr. Jones backs up and rams the officer's vehicle a second time. JA 102-03. Cpl. Jones attempts to get out of his seat belt or place his vehicle in gear but is unable to prior to being rammed. JA 102-03; 132-34.

When the Jeep began accelerating backwards a second time, Cpl. Jones discharged his weapon sixteen times. JA 141-42. All shots were fired as the vehicle was approaching the officer and at point of impact. *Id.*; JA 103, 148, 153, 231, 234. After the shots were fired, Mr. Jones drove away toward the intersection and turns left on Beechwood Lane. JA 148, 163-64, 231-32. There were no shots fired as Mr. Jones drove away. JA 148, 231, 234. Cpl. Jones drives to the intersection, calls 911 and tells the dispatcher that he shot Chenier Hartwell. JA 116-18, 232.[3] Mr. Jones died as a result of the injuries sustained. JA 13.

REASONS FOR GRANTING THE WRIT

There is currently a divergence in the manner that the circuit courts approach appeals based on qualified immunity and guidance from the Supreme Court is required to ensure uniformity. The inconsistency in the approaches was recognized in *Cunningham v. City of Wenatchee*, 345 F.3d 802, 808 (9th Cir. 2003), wherein the Ninth Circuit stated "[a]s Johnson pointed out, various courts of appeals have held different views about the immediate appealability of the claims of public officials who assert qualified immunity defenses. Notwithstanding the decisions of Johnson and Behrens, the courts still seem to be in somewhat disarray as to the proper rules to follow."

Some of the circuits have adopted an approach similar to a district court's review initially of a motion for summary judgment, i.e. whether the facts and inferences taken in the light most favorable to the non-movent establish a constitutional violation.

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[3] Cpl. Jones saw the driver when got out of the jeep and approached his car. He describes him as a "tall, slim male". JA 116-17. Based on the general description of the driver being tall and slender, which is closer to the physical description of Mr. Hartwell than Mr. Gilchrist, Cpl. Jones made an assumption that he shot at Mr. Hartwell. JA 117-18.

The Eighth Circuit in *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005), described this approach clearly in stating

> [w]hen the district court has denied qualified immunity on the ground that material facts are disputed, as in this case, we may not review the sufficiency of any evidence that is disputed. Instead, we view the facts in the light most favorable to plaintiff and determine whether those facts establish that defendant infringed plaintiff's clearly established constitutional or statutory rights.

Id. at 991; *See also Bankhead v. Knickrehm*, 360 F.3d 839, 843 (8th Cir. 2004)("[a] denial of summary judgment on the ground of qualified immunity may be reviewed on interlocutory appeal when the issue presented is a purely legal one: whether the facts alleged [or shown by the summary-judgment record] . . . support a claim of violation of clearly established law.").

This procedure has also been adopted by the First and Ninth Circuits. The court in *Cunningham* explained that "[i]n following the admonition in Mitchell, we assume the facts shown by Cunningham, the nonmoving party, as being true for the purpose of deciding the abstract legal question governing qualified immunity." *Cunningham v. City of Wenatchee*, 345 F.3d at 809; *See also Johnson v. County of L.A.*, 340 F.3d 787, 791 n1 (9th Cir. 2003)(".. .we have jurisdiction over interlocutory appeals that concern qualified immunity even when "the determination of qualified immunity depends upon disputed issues of material fact" so long as 'we assume the version of the material facts asserted by the non-moving party to be correct.'"); *Rivera-Jimenez v. Pierluisi*, 362 F.3d 87, 95 (1st Cir. 2004)("Since 'pre-trial qualified immunity decisions are immediately appealable as collateral orders when the immunity claim presents a legal issue that can be decided without considering the correctness of the plaintiff's version of the facts,' we cannot exercise jurisdiction over this part of the qualified immunity analysis.").

Another group of circuits, find only those facts determined by the district court can be considered on review of a denial of

qualified immunity. In *Rivas v. City of Passaic*, 365 F.3d 181, 192 (3d Cir. 2004), the Third Circuit stated

> We recently announced that we understood Johnson to mean that, "if a defendant in a constitutional tort case moves for summary judgment based on qualified immunity and the district court denies the motion, we lack jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove; but we possess jurisdiction to review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right."

See also *Simms v. Bruce*, 104 Fed.Appx. 853, 854-55 (4th Cir. 2004).

The latter approach threatens the continued viability of any review from denials of qualified immunity. In denying qualified immunity on motions, the trial court must conclude that the conduct at issue either amounts to a constitutional violation or that a dispute as to a material fact exists. A decision not to review the latter cases, and accept the trial court's judgment regarding the existence of this dispute, frustrates the *Mitchell* decision's recognition that qualified immunity is

> an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, at 526, 105 S.Ct at 2815. Interestingly, the Fourth Circuit understood this peril in *Parrish v. Cleveland*, 372 F.3d 294, 301 (4th Cir. 2004), wherein it stated

> [u]nder the collateral order doctrine, a district court order is final, 'even if it does not terminate proceedings in the district court, so long as it conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment.'

(citations omitted).

The trial court has created a substantial record of its findings of fact for an appellate court to review. At the critical moments, it concluded that the following occurred:

> The Jeep's driver then began to drive away, leading Officer Jones to believe the encounter had ended and that the driver was leaving. Officer Jones then heard tires spinning and saw the Jeep backing towards him. The Jeep struck Officer Jones's SUV, and "rocked" him around inside his SUV. The Jeep's driver then pulled the Jeep farther forward than he bad been before the first collision, raced its engine and spun its wheels in reverse causing smoke to come from the Jeep's tires, and struck Officer Jones's SUV a second time. The second collision was apparently stronger than the first one.
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> After the black Jeep struck his SUV a second time, Officer Jones fired 16 shots from his firearm into the back of the Jeep, hitting the Jeep's driver five times. After the shooting, the Jeep's driver drove away. No shots were fired as the Jeep drove away Officer Jones drove to an intersection, called 911, and told the dispatcher he had just shot Hartwell. In fact, Officer Jones had shot the decedent Prince Carmen Jones, Jr., who later died of his injuries.

App., infra, 6a-7a.